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July 20, 2011

[Complainants]

**** Superintendent

*** Public Schools

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** In the Matter of ***, 2011-04, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education provisions.

Dear [Complainants] and Superintendent ***,

This is the Final Report pertaining to the above-referenced state special education complaint ("Complaint") filed pursuant to Admin.R.Mont. (ARM)10.16.3662. *** ("Complainants"), parents of *** ("Student"), allege the *** Schools ("District") failed to provide a free and appropriate public education (FAPE) under the Individual's with Disabilities Education Act (IDEA) and Montana special education laws.

Specifically, Complainants allege:

1. The District failed to provide an appropriate Extended School Year (ESY) program during the summer of the 2009-2010 school year.
2. The District failed to provide the Complainants with all the Student's educational records.

A. Procedural History

1. On May 20, 2011, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainants.
2. The OPI provided a copy of the Complaint to the District. The OPI Early Assistance Program attempted to resolve the controversy pursuant to Admin. R. Mont. 10.16.3660 but concluded that resolution was not possible.
3. The District provided written responses to the Complaint on June 24, 2011.
4. The investigation consisted of a review of documents provided by Complainants and the School District along with interviews of Complainants and the District Special Education Coordinator.

B. Legal Framework

The Office of Public Instruction (OPI) is authorized to address violations of the Individuals with Disabilities Education Act (IDEA) and Montana special laws occurring within one year as described in 34 CFR §§ 300.151-153 and ARM 10.16.3661.

All relevant information is required to be reviewed and an independent determination made as to whether the District violated IDEA and state law. 34 CFR §§ 300.151-153 and ARM 10.16.3662. An investigator was appointed as part of this investigation.

C. Issues

1. Whether the District provided an appropriate ESY program during the summer of the 2009-2010 school year.

Findings of Facts

1. Complainants have standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3662.
2. The Student is a 7 year-old first grader who is currently attending school in the District.
3. The Student is currently eligible for special education under the categories of Autism and Speech and Language Impaired.
4. An IEP dated February 1, 2010 IEP was the current IEP at the time of the 2009-2010 school year ESY program at issue here. It provided for the following special education and related services for the period of February 2, 2010 to February 1, 2011:

Special Education	Education Setting	Total Minutes per week
Adapted PE	Special Education	60
Social/Emotional/ Behavioral	Special Education	1900
Self-Help/Independence	Special Education	1900
Math	Special Education	1900
Reading	Special Education	1900

Related Services	Education Setting	Total Minutes per week
Occupational Therapy	Special Education	30
Speech Therapy	Special Education	60
Transportation		1

6. The Student's regular school year placement was in a self-contained special education classroom with five other students, the teacher, one aide, and one roving aide.
7. The February 2, 2010 IEP team decided that ESY services were necessary for the student. The IEP form requires the team to describe in detail the extended school year services to be provided. No description of ESY services was given. The IEP was not changed or amended to detail the necessary summer ESY services, leaving the

February 2, 2010 IEP services applicable for the duration of ESY. All IEP goals stated the Student was expected to meet his goals.

8. The summer ESY program consisted of three classrooms separated by age and need: preschool; more independent students; and a smaller class size (11 students as compared with 12 students in the other classes).
9. The Student's ESY program consisted of 3-4 hours per day, four days a weeks, for five weeks. The class had 11 students, one teacher, three aides, and three volunteers. The placement determination was based on the recommendations of the Student's teacher and the Student's age, not the Student's IEP team.
10. The Student attended all but one week of the ESY program.
11. During the ESY program the Student received 60 minutes of speech per week and some occupational therapy (OT), but not the 30 minutes of OT per week provided for in the IEP. No contemporaneous documentation of professional service delivery was provided by the District.
12. In the February 1, 2010 IEP, the occupational therapy goal states, "During the next IEP period, [Student] will demonstrate the ability to complete pre-academic tasks with 80% accuracy as measured by therapist/teacher data collection." The goal has four benchmarks leading up to the goal. The goal was marked to be part of ESY and marked that Student was expected to meet the goal. The June 4, 2010 progress report states, "[Student] will engage in a variety of therapy activities with greater ease. He will trace and copy with intermittent hand over hand assistance. Attention for task has improved but he continues to require redirection to task." The ESY report does not discuss the goal and no other ESY information addressed it.
13. The June 4, 2010 progress report and the undated ESY Comments¹ were the last progress reports completed for the remainder of the IEP period at issue. An October 2, 2010 "progress note" and October 29, 2010 meeting made changes to the February 2, 2010 IEP which were finalized at a November 22, 2010 IEP meeting.
14. The following information delineates the Student's IEP goals and June 4, 2010 progress reports including the District's ESY data and comments, and investigation comments from the teacher:

Goal 1: [Student] will match identical object/shapes to an array of 3 or more items 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
At this time we are working with [Student] with matching one shape to 1 item. He gets distracted with more than 3 at this time. As his attention span grows, we will continue to add more items. Expected to meet goal.	0/5	During ESY, [Student] did not demonstrate this skill for us.	None

¹ The District reports the ESY Comments were completed in July, 2010 at the end of ESY.

Goal 2: [Student] will be able to match up to 5 shapes /blocks to a design card/shape sorter with no more than 2 teacher prompts 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student] does a great job with the shape sorter. Once he find where one shape goes, he will choose all the same shapes and finish those first. This is a great strategy he has learned. Once he masters the shape sorter, we will move on to two-dimensional activities. Expected to meet goal.	1/5, 0/5, 0/5, 2/5, 1/5	During ESY, when [Student] uses the shape sorter, he was able to sort shapes correctly between 0 and 2 times out of 5 attempts. I would prompt Student by pointing at times, but it was hard to get him to focus this summer.	"Mastered the shape sorter from 3/26/10" "Consistent with 6/4"

Goal 3: [Student] will be able to complete at least 5 different single-piece inset puzzles that have 4 or less pieces independently 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
At this time [Student] is working on completing single piece puzzles. He is getting them put together with trial and error but is sitting longer and staying more focused to where he will look to see what and where the pieces go. Expected to meet goal.	3/5PA 2/5I 3/5PA 2/5I 4/5PA 1/5I 4/5PA 1/5I 3/5PA 2/5I	During ESY, [Student] did a great job on puzzles. He was able to do 1-2 puzzles independently and 3-4 with just some simple staff assist, such as pointing to where a piece may go or helping him turn the piece the correct way.	"Consistent with 6/4" "Mastered this goal from 3/26"

Goal 4: [Student] will match an item to its exact picture in an array of 3 items 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student] has a little bit more difficult time with this task than he does with 3-D objects. He gets confused with the pictures and lies to look and play with pictures not quite understanding they are the same as the object. Expected to meet goal	4/5	During ESY, [Student] was able to match items to pictures (When given up to 3 pictures at a time) 4 out of 5 days attempted. Way to go [Student]!	"Significant progress since 3/26" "Mastered the goal" "Mastered the 6/4 goal"

Goal 5: When given a random item, [Student] will match the item to an exact picture if the item is included in an array of 3 different pictures 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
No comment or data given. Expected to meet goal	None noted	None	None

Goal 6: [Student] will be able to urinate in the toilet at least 2 times per day 4 out of 5 days per week as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student] has urinated 32 times this quarter. We are working with him following the picture schedule and completing as much of this task independently as possible. Expected to meet goal.	2/5	During ESY, [Student] would usually get upset when staff took him into the bathroom. We were able to get him to go 2 days out of 15 attended, of which are only 1/2 days.	"Not measurable comparison because of 1/2 day"

Goal 7: [Student] will be able to wash and dry his hands independently only with assistance of turning on/off the water as needed 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student] is completing his hand washing with adult prompts at this time. He is needing hand over hand assistance when drying hands and throwing away his paper towel. This is becoming less and less. Expected to meet goal.	3/5	[Student] needed a lot of verbal and some physical prompts in order to wash his hands, but he did so independently 3 out of 15 days attended during ESY.	"Independence is progress"

Goal 8: When provided a step by step picture schedule, [Student] will follow the steps with less than 3 adult prompts to complete the schedule (washing hands, morning routine, etc.) at least two times per day on 4 out of 5 days per week.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
No comment or data given. Expected to meet goal	0/5	During ESY, [Student] did not demonstrate this benchmark. He would often throw himself on the ground and become very upset when asked to follow his picture schedule. This could be because there were more students than what he is used to and all the staff members are different than what he is used to.	None

Goal 9: [Student] will be able to request up to 10 desired items by signs or vocal as well as request up to 10 desired activities at least 10 times per day 80% of the time as measured by teacher data. (Note: This goal was not checked on the IEP as being part of ESY but data was collected during ESY.)

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
No information	1/10, 0/10, 3/10, 1/10, 2/10	During ESY, [Student] demonstrated the signs eat, more, yes, and play when prompted and shown signs first. He would use the sign "more" most often.	"Progress"

Goal 10: When provided with communication techniques (signs, break card, or pictures) and behavior regulation skills, [Student] will use the provided techniques to make a request with fewer than 5 episodes of biting, pinching or head banging per day 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student's] behaviors have been improving every day. We have had few episodes since this IEP period. When he is biting, he is given his chewy. I have not seen head banging in a while. He is offered a break when he becomes upset by showing him his break card and taking him to a calm place. Expected to meet goal	0/5	[Student] did not demonstrate this skill during ESY. When he became too upset, a staff member would take him to a different room where there were less kids and it was quiet so he could calm down. Once he did this, he was able to come back to the classroom and work or participate for a short time! Good job [Student]!	None

Goal 11: When given the opportunity to receive sensory processing support measures (deep pressure input, skin brushing/joint loading, elimination of visual input under blanket, etc.), [Student] will regulate current difficulties and responses to environmental operations 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
No information or data given. Expected to meet goal.	2/5	[Student] would occasionally allow staff to provide sensory input. Most of the time he would prefer to leave the room, but sensory processing was offered every day, depending on what his needs were.	"Training evident" "Offered sensory"

Goal 12: [Student] will be given redirection to appropriate behaviors (quiet voice, arms down, sit down) when disruptive behaviors occur during structured classroom time with appropriate correction procedures and/or positive reinforcement for performance of appropriate behaviors 80% of the time as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student] is being provided with redirection when disruptive behaviors are occurring. Depending on the day, [Student] may only need the verbalization from the teacher, other days he may need signs as well as physical prompts. He responds well to his name now and when given wait time usually stops with the disruptive behavior. Expected to meet goal.	0/5, 2/5, 2/5, 1/5, 2/5	During ESY, [Student] would respond independently to redirections between 0 and 2 times for every 5 redirections given. He would often need prompting in order to follow the redirections given.	None

Goal 13: [Student] will return greetings from peers/teachers with eye contact and a wave/sign for "Hello" 4 out of 5 days as measured by teacher data.

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
No information or data given. Expected to meet goal.	5/5	[Student] did a great job at giving eye contact for greetings. He would do this independently when greeted with "good morning" and most of the time when saying "good-bye". He would sometimes need verbal prompts to look, but would do so when asked.	"Progress"

Goal 14: [Student] will increase receptive and expressive skills by verbalization and/or sign of 10 words, respond with eye contact when his name is called, and follow 1 step directions with no more than 2 prompts @ 80% in 4 out of 5 sessions as measured by therapist data collection, observation, and/or reported by staff.
(Note: Three benchmarks/short-term objectives related to this goal are in the IEP.)

6/4/2010 Progress	ESY Data	ESY Comments	Investigation
[Student] is imitating sign during eating or drink and/or eat @ 70%. He responds to his name by looking up and turning towards therapist @ 60%. [Student] is following 1 step directions @40%. Expected to meet goal.	See ESY comments	[Student] was present for 4 out of 5 ESY speech sessions. With one-to-one assistance, [Student] was able to follow directions and attend to task for three ten-minute stations 25% of the time.	None

Analysis and Conclusions of Law

Complainants allege the District failed to provide an appropriate ESY program for the Student. They believed the student-to-teacher ratio was too high, paraprofessionals were not adequately trained, and services were not adequately provided. They assert the Student made no progress and actually regressed in his education during ESY due to the District's actions. The District asserts the ESY program was appropriate and the Student either maintained or progressed in his skill level.

Once an IEP team determines that extended school year services are appropriate, a district must ensure the services are made available to provide FAPE and must ensure those services are determined on an individual basis in accordance with the student's IEP. 34 CFR § 300.106. The regulation specifically prohibits a district from unilaterally limiting the type, amount, or duration of those services. *Id.*

At the February 1, 2010 IEP meeting, the parties agreed on the IEP goals to be addressed in the Student's extended school year program. However, in June, 2010, at the time those ESY services were to be provided, no IEP meeting was held and the District unilaterally made ESY decisions regarding the amount and duration of services rather than continuing to implement the IEP as written. The District limited ESY services to five weeks at four days a week, 4-5 hours a day eg. 960-1200 minutes per week. In contrast, the IEP called for 1900 minutes per week of special education services.² The District reportedly provided 60 minutes of speech services as called for in the IEP but did not provide the required full 30 minutes of occupational therapy per week. Further, at least one goal was unilaterally dropped from ESY program.³

No IEP meeting was held before ESY started. No notice to the parents was sent informing them of the particular changes in the Student's program or obtaining their consent. The District failed to provide the services as delineated in the IEP. 34 CFR § 300.106. By unilaterally deciding the ESY services, the District circumvented the Complainants' rights to participate (34 CFR § 300.322), Prior Written Notice (34 CFR § 300.503), and consent (ARM 10.16.3505). Further, the purpose of sharing information (including data information which may become an "education record") with the parents is to ensure informed parent participation. All the goals in the IEP state that data will be collected for that goal. While tally and data sheets used by teacher or therapists to keep track of a student's daily activities are generally not considered to be education records unless they are maintained by the District, the District appeared to share certain summations of IEP activities but shared no data or other records relating to the child with the parents which served to deprive them of their right to meaningfully participate in development of the Student's IEP and ESY programs.⁴ As a result, the District is found to be **non-compliant** with 34 CFR §§ 300.106, -300.322, -300.503, and ARM 10.16.3505.

In addition, ESY services are intended to prevent regression (rather than advance educational goals.) *Mahesh Reinholdson, a minor, by his parent, Jan Simon v. School Board of Indpt. S. Dist. No. 11*, 187 F. App'x 672, 46 IDELR 63 (8th Cir.). Here, the Student made little or no progress and actually did worse on nearly half of the goals the IEP Team anticipated he would meet. The investigation and documents show that during ESY the Student appeared to regress

² The IEP actually lists 1900 minutes each for four areas and 60 minutes for one area. We will assume the 1900 minutes are an aggregate of the four areas since 1900 hours per week would be 31.66 hours per week.

³ See Finding of Fact No.12.

⁴ 20 USC §1415(b)(1) grants parents of a child with a disability an opportunity to "examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provisions of FAPE.

in 5 of the 13 goals rather than maintain his current levels of performance.⁵ In 2 goals, the Student did maintain or make progress.⁶ In the remaining 6 goals, this investigation could not make a determination because no data was collected or the information collected was conflicting.⁷ Further, some of the collected data didn't correspond to the specifics in the goal or appeared to respond to something other than the stated goal.⁸ While all the IEP goals stated that data would be collected for determining progress, two had no data at all.⁹ Given this information, the District is **non-compliant** with 34 CFR § 300.106 in these respects as well.

The fact that the Student regressed in various skill areas during ESY demonstrates at least some level of loss of educational opportunity and educational harm attributable to the District's actions for which compensatory services must be examined. Compensatory services are an equitable remedy and are not necessarily calculated minute-by-minute for services missed. *Park v. Anaheim Union School District*, 444 F.3d 1149, 45 IEDLR 178 (9th Cir. 2006). The purpose is to restore the Student to where he would have been had he received all the services in the frequency and amount called for in his February 1, 2010 IEP. This task will be remanded to the IEP Team with the assistance of an OPI facilitator to address the type, amount, frequency, and duration of compensatory services after consideration of the footnoted factors and a thorough review of the Student's progress to date.¹⁰

2. Whether the District provided all the Student's personally identifiable educational records to Complainants.

Findings of Fact

1. On January 18, 2011, the Complainants sent a letter to the District requesting a copy of the Student's education records. The letter requested 22 specific documents.

⁵ Goals 1,2,3,8,10.

⁶ Goals 4 and 13.

⁷ Goals 5, 6, 7, 11, 12,14. Goal 9 not marked in IEP to be included in ESY so not included here.

⁸ See Goal 14 for this latter point.

⁹ Goals 5 and 14.

¹⁰ A number of factors complicate a determination of compensatory education given the Student's current progress:

- The February 1, 2010 ESY did not cycle a full year; ESY was in the middle of the cycle, and the IEP was changed on November 22, 2010. Because goals are usually written on an annual basis, one would not necessarily expect the goals to be met in a shorter time, although progress towards the goal can still be assessed.
- The new IEP dated November, 2010, raised the levels of some of the previous IEP goals. Other goals were completely changed or dropped, and a few remained unchanged. Thus, it is difficult to extrapolate the progress, or lack thereof, from the February 1, 2010 IEP to November 22, 2010 IEP.
- No progress reports were done between the end of the ESY program on July 15, 2010 and the development of the new IEP on November 22, 2010.
- The Student missed one week of ESY services which could have a negative effect on progress.
- The June 4, 2010 progress report had little data to compare progress with the ESY data despite that fact that all IEP goals stated they would be measured by "teacher/therapist" data collection and the Student was expected to meet all his goals.

2. On January 31, 2011, the District provided Complainants a portion of the requested documents, but not all. The provided documents included attendance records from August 25, 2010 to June 4, 2011.
3. The District asserted some of the requested records did not exist and other records, such as personal notes of professional therapists and data collection documents, were not accessible or not education records.
4. Complainants made subsequent requests on January 31, February 7, and April 29, 2011, for the documents that were eventually provided.

Analysis and Conclusions of Law

Complainants allege the following educational records were not provided:

- March, 2007 to July, 2010 attendance records;
- Records showing dates and times on which [Student] was provided school-based related services from the speech therapist and occupational therapist from March, 2007 to the present;
- Any data collected under a data collection system on [Student's] IEP goals from March, 2007 to the present.

The District responded that all FERPA and educational records were given to Complainants and attendance records were not kept for the Student's preschool placement. They assert the school based occupational and speech therapists log their own personal notes and shared them with the District and while the notes in the sole possession of the therapists are not treated as educational records, each would have provided progress notes, which are a part of the record.¹¹

A district must permit a parent to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. 34 CFR § 300.613. Education records are defined by the Family Education Rights and Privacy Act (FERPA) regulations to be those records that are directly related to a student and maintained by the public agency. 34 CFR § 99.3 An exception exists for records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person. 20 USC § 1232g(a)(4)(B)(i). *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 36 IDELR 62 (U.S. 2002).

With regard to the attendance records, there is no evidence that the District maintained attendance records during the Student's preschool years from March 2007 to July, 2010 and the OPI does not require a District to maintain preschool attendance records. The District did provide records to Complainants for August, 2009 through at least July, 2010. Further, there is no evidence that the speech therapist and occupational therapist shared any education records with others that were not given to the parents. The therapists' personal notes were reportedly in their sole possession and are not considered to be an educational record. Based on

¹¹ District interviews also stated that the progress notes given to Complainants were also "used to verify service delivery for Medicaid reimbursement" but no verification of this or of specific dates of professional services was provided.

evidence that the District disclosed all of the Student's education records, the District is found to be **in compliance** with 34 CFR § 300.613.

E. Disposition

The District is hereby ORDERED to take the following steps:

1. By **September 15, 2011**, the District must review and revise its ESY policies, practices, and procedures to ensure compliance with 34 CFR § 300.106. Each policy must be approved by the Dispute Resolution Director and then provided to all District administrators and special education staff.
2. By **September 15, 2011**, the District will provide training to the special education staff, including administrators, to address the following areas of noncompliance:
 - ESY
 - Implementation of IEP
 - Data collection and progress reporting
 - Parent Involvement
 - Parent ConsentThe training must be provided by someone approved by the Dispute Resolution Director. All participants must sign in and the list forwarded to the Dispute Resolution Director.
3. By **September 15, 2011**, the District, directed by an OPI-appointed IEP facilitator, must reconvene the Student's IEP team to review data and determine the amount, frequency, and duration of compensatory services. All compensatory services, if any, must be completed within one year and must be approved by the Dispute Resolution Director. A copy of the proposed compensatory education plan, including supporting data, must be received by **September 30, 2011**.
4. To ensure compliance is maintained, the District must provide to the Dispute Resolution Director, two randomly selected IEPs with ESY services which are drafted *after* the above trainings and two additional such IEPs **each quarter** for one year or until such time as the District demonstrates continued compliance.

Sincerely,

/s/ Ann Gilkey

Ann Gilkey, Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director